Office-Supreme Court, U.S.
FILED
NOV 28 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-339

In the Supreme Court of the United States

OCTOBER TERM, 1984

GERALD SCARPELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires application of a reasonable doubt standard to a finding that a convicted defendant is a "dangerous special offender," a predicate to imposition of the enhanced sentence authorized by 18 U.S.C. 3575.

2. Whether 18 U.S.C. 3575 requires a sentencing court to separate its statement of the reasons that a convicted defendant is a "special offender" from its statement of the reasons that the defendant is "dangerous."

3. Whether the information presented to the court in this case was sufficient to support its decision that petitioner is a dangerous special offender.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 738 F.2d 441 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-14a) was entered on June 7, 1984. A petition for rehearing was denied on July 3, 1984 (Pet. App. 15a). The petition for a writ of certiorari was filed on September 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 5, 1983, petitioner, a previously-convicted felon, was indicted in the United States District Court for the Northern District of Illinois for receiving a firearm transported in interstate commerce, in violation of 18

U.S.C. 922(h). The government subsequently filed a petition under 18 U.S.C. 3575 requesting the court to impose an enhanced sentence upon petitioner because he qualified as a dangerous special offender. The government's petition alleged, among other things, that petitioner had three prior felony convictions and had "participated in a number of other crimes, including six murders, two armored car robberies, approximately twenty burglaries, and various other offenses" (Pet. App. 2a). On July 5, 1983, petitioner entered a plea of guilty pursuant to a written plea agreement which was accepted by the court and provided for a " 'sentence of incarceration to be determined by the Court of not less than three (3) years and not more than seven (7) years if it appears that the defendant is a dangerous special offender, or not more than five (5) years if it does not so appear' " (*ibid.* (citation omitted)).

A sentencing hearing was held on September 26, 1983. Pursuant to a provision of the plea agreement, the government and petitioner stipulated to the testimony that the witnesses would have presented at the hearing (Pet. App. 2a-3a). At the conclusion of the hearing the court found that petitioner was a dangerous special offender. It sentenced him to imprisonment for seven years, a period two years greater than the maximum sentence otherwise authorized for a violation of 18 U.S.C. 922(h) (see 18 U.S.C. 924(a)). Pet. App. 3a.

2. In concluding that petitioner was a dangerous special offender, the court initially stated that what " 'impressed [it] unfavorably * * * is the fact that [petitioner] has not two but three prior convictions, two of them particularly serious' " (Pet. App. 10a). These convictions were for armed robbery, counterfeiting, and possession of burglary tools and theft (Appellee Br. App. 2). After a brief colloquy with petitioner's counsel, the court repeated (Pet. App. 10a):

> [T]he three prior convictions are sufficient to justify the sentence in view of the circumstances of the crime and the background of the defendant. * * * * * [W]ithout anything more, a seven-year sentence would be consistent with the objectives of the statute and with the nature of the offense, in other words[,] not disproportionate in severity to the maximum term otherwise authorized by law."

The court then reviewed in detail four of the stipulations of testimony concerning petitioner's involvement in other criminal offenses and concluded that the seven year sentence also was justified on the basis of the stipulated testimony (Pet. App. 3a, 11a-12a).

3. The court of appeals unanimously affirmed the sentence imposed upon petitioner by the district court (Pet. App. 1a-14a). It held that the procedures followed by the district court satisfied the requirements of due process, that there was sufficient evidence to support the district court's determination that petitioner is a dangerous special offender, and that the district court's findings were adequate to support this determination.

ARGUMENT

The unpublished decision below is correct and does not conflict with any decision of any other court of appeals or with any decision of this Court. Review by this Court therefore is not warranted.

1. In any case in which the defendant is charged with a felony and is over the age of 21, prior to trial or acceptance of a guilty plea the government may file a notice stating that the defendant is a "dangerous special offender" subject to enhanced sentencing (18 U.S.C. 3575(a)). If the defendant is convicted or pleads guilty to the felony and appears to be a dangerous special offender "by a preponderance of the information" presented at trial, in the presentence report, or

in a presentencing hearing, he must be sentenced to "imprisonment for an appropriate term" not exceeding 25 years (18 U.S.C. 3575(b)). The sentence may be greater than the maximum term for the offense otherwise provided by law, but it may not be disproportionate to that maximum term (*ibid.*).

"Special offender" is defined in the statute to include several categories of defendants who have engaged in a pattern of criminal conduct, such as persons convicted of at least two felonies and imprisoned for one of them, provided that it has been less than five years since the commission of one of the felonies or since the defendant's release from prison (18 U.S.C. 3575(e)). A defendant is "dangerous" if "a period of confinement longer than that provided for [the felony for which he is being sentenced] is required for the protection of the public from further criminal conduct by the defendant" (18 U.S.C. 3575(f)).

2. Petitioner claims that the Due Process Clause bars a court from imposing an enhanced sentence unless it finds beyond a reasonable doubt that the convicted defendant is a dangerous special offender. He asserts (Pet. 6-9) that 18 U.S.C. 3575 is unconstitutional because it contains a "preponderance of the information" standard. The court of appeals properly rejected this argument, relying upon its earlier decisions in *United States* v. *Inendino*, 604 F.2d 458 (7th Cir.) cert. denied, 444 U.S. 932 (1979), and *United States* v. *Neary*, 552 F.2d 1184 (7th Cir.), cert. denied, 434 U.S. 864 (1977), both of which held that the preponderance standard was constitutional.

As noted by the court below (Pet. App. 7a), and as petitioner concedes (Pet. 7), the same conclusion has been reached by every court of appeals that has considered this question. See *United States* v. *Davis*, 710 F.2d 104, 105-108 (3d Cir. 1983), cert. denied, No. 83-5619 (Nov. 28, 1983);

United States v. *Schell*, 692 F.2d 672, 676-679 (10th Cir. 1982); *United States* v. *Inendino*, 604 F.2d at 463; *United States* v. *Williamson*, 567 F.2d 610, 615 (4th Cir. 1977); *United States* v. *Ilacqua*, 562 F.2d 399 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States* v. *Bowdach*, 561 F.2d 1160, 1172-1175 (5th Cir. 1977); *United States* v. *Neary*, 552 F.2d at 1193; *United States* v. *Stewart*, 531 F.2d 326, 332 (6th Cir.), cert. denied, 426 U.S. 922 (1976).

Petitioner contends that this unanimous view is incorrect because it conflicts with this Court's decision in *Specht* v. *Patterson*, 386 U.S. 605 (1967), but that case also supports the constitutionality of 18 U.S.C. 3575. In *Specht*, the petitioner had been convicted for indecent liberties under a state statute providing for a maximum sentence of ten years, but was sentenced under the state Sex Offenders Act, which permitted the imposition of an indeterminate term of one day to life. The statute required a psychiatric examination of the petitioner, the results of which were reported to the court. The court then imposed the indeterminate sentence without a hearing or cross-examination by the petitioner.

The *Specht* Court noted (386 U.S. at 606, 608) that it had held in *Williams* v. *New York*, 337 U.S. 241 (1949), that a hearing and cross-examination were not required in connection with the imposition of a sentence. It found, however, that the Sex Offenders Act was "radically different" from the typical sentencing procedures addressed in *Williams* (386 U.S. at 608), and it held that a defendant sentenced under such a statute was constitutionally entitled to additional procedural protections (*id.* at 610):

> Due process * * * requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his

> own. And there must be findings adequate to make meaningful any appeal that is allowed.

Some courts of appeals have found that *Williams* rather than *Specht* governs the process due under 18 U.S.C. 3575 because both the procedure and the substantive determination made by the sentencing court more closely resemble conventional sentencing than the statute before the Court in *Specht*. *E.g.*, *United States* v. *Williamson*, 567 F.2d at 615; *United States* v. *Stewart*, 531 F.2d at 333-334. However, even if *Specht* applies to 18 U.S.C. 3575, petitioner's argument must fail because the statute explicitly includes all of the procedural protections listed by this Court in *Specht*. See 18 U.S.C. 3575(b).[1] Since *Specht* does not require proof beyond a reasonable doubt in a post-conviction sentencing proceeding, it does not support petitioner's argument that a heightened burden of proof must be applied in proceedings under 18 U.S.C. 3575.[2]

3. Petitioner contends (Pet. 3-6) that 18 U.S.C. 3575 requires a sentencing court to make separate and independent findings in support of its determinations that a defendant is "special" and that he is "dangerous." The statute states that the court must "place in the record its findings, including an identification of the information relied upon in

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[1]The legislative history of 18 U.S.C. 3575 indicates that Congress included these guarantees in order to ensure that the statute satisfied the requirements of due process. S. Rep. 91-617, 91st Cong., 1st Sess. 90-92, 163 (1969).

[2]A heightened proof standard is unnecessary in this context because the defendant's guilt already will have been established beyond a reasonable doubt at trial or through a guilty plea. In addition, because the statute requires courts to make subjective predictions of future behavior, which this Court has observed (*Addington* v. *Texas*, 441 U.S. 418, 430 (1979)) generally cannot be established to the same degree as specific facts in criminal trials, a reasonable doubt standard could prevent the imposition of enhanced sentences in most cases.

making such findings, and its reasons for the sentence imposed." 18 U.S.C. 3575(b). In rejecting petitioner's argument, the court below concluded that petitioner had presented no legal support for such a hypertechnical interpretation of this requirement (Pet. App. 9a).

The decision of the court of appeals is correct. Petitioner has again presented no support for his position other than his bare assertion that the decision below is contrary to the express language and legislative history of the statute (Pet. 6). Nothing in the express language of the statute supports petitioner's position. The statute states only that the court must set forth its findings and identify the information upon which it relied in making the findings. There is no suggestion that the sentencing court must separate and discretely identify the information it relied upon in deciding that a defendant is a special offender and the information it relied upon in deciding that the defendant is dangerous. Such a requirement would be surprising in view of the fact that a court can rely upon the same information to support both conclusions (see note 4, *infra*).

The legislative history similarly provides no basis for petitioner's claim. The requirement of findings is designed to facilitate appellate review (see *United States* v. *Felder*, 706 F.2d 135, 141 (3d Cir. 1983)), but petitioner does not point to any defect in the district court's findings that inhibited appellate review in this case.[3]

4. Petitioner claims that a defendant may not be classified as a dangerous special offender based "on a finding that a defendant has been convicted three times before over a

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[3]The district court did not recite the statutory formulation that additional confinement was "required for the protection of the public" in concluding that petitioner was dangerous. As discussed below, however, its analysis of the information presented by the government makes clear that it was applying this standard.

twenty year time span without examining the details of these crimes" (Pet. 9). Thus, he asserts that the evidence was "totally insufficient" to support a finding that he was "dangerous" (Pet. 10).

The district court did state that petitioner's three prior convictions alone justified the imposition of an enhanced sentence, but it did not rely solely on these convictions in concluding that petitioner was dangerous.[4] It stated that " 'two of [the convictions were] particularly serious' " and that the three prior convictions were " 'sufficient to justify the sentence *in view of the circumstances of the crime and the background of the defendant*' " (Pet. App. 10a (emphasis added)). Petitioner's history of criminal activity certainly supports the district court's conclusion that an additional period of confinement was necessary to protect the public. See *United States* v. *Schell*, 692 F.2d at 675 (upholding finding of dangerousness based upon the nature of the defendant's prior convictions).

Moreover, as the court of appeals noted, "the trial court went on * * * to delineate certain information contained in the stipulations in further support of its conclusion" (Pet. App. 11a). The stipulations relied upon by the sentencing court set forth the expected testimony of law enforcement officers and other witnesses concerning petitioner's connection with an armored car robbery, a murder, and several series of burglaries (Pet. App. 12a).[5] The court of appeals

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[4]The district court could have relied on the convictions alone because, as the court of appeals noted (Pet. App. 11a), the legislative history specifically authorizes the district court to rely upon a defendant's convictions in finding that he is dangerous (S. Rep. 91-617, 91st Cong., 1st Sess. 166 (1969)).

[5]The use of this information in a sentencing proceeding is authorized by 18 U.S.C. 3577, which provides that "[n]o limitation shall be placed on the information concerning * * * [a convicted defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

found that the information before the district court indicated that petitioner had an "almost perpetual record of criminal activity" (Pet. App. 14a). Its conclusion that "the implicit 'dangerousness' finding underlying the court's decision * * * was supported by more than substantial evidence" (Pet. App. 12a) is clearly correct.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1984

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[6]Thus, contrary to petitioner's claim (Pet. 5, 10), there is no conflict between the decision below and *United States* v. *Warme*, 572 F.2d 57 (2d Cir. 1978). In each case the court upheld a finding of dangerousness based upon the defendant's prior convictions and other information regarding the defendant's character and past conduct (see 572 F.2d at 62).

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